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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-

ROBERT J. WHITAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

and

JACQUELYN E. WHITAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO: The Honorable The Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States.

The petitioners respectfully pray that writ of certiorari issue to review the final order of the United States Court of

Appeals for the District of Columbia Circuit entered on December 27, 1974, that affirmed the judgment and conviction against the said petitioners in the United States District Court (for the District of Columbia) Criminal Case No. 845-73.

OPINIONS BELOW

There was no opinion in the United States District Court for the District of Columbia.

There was a memorandum opinion of the United States Court of Appeals, and the same is appended hereto. The said opinion is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was dated and entered on December 27, 1974.

On January 28, 1975, the Honorable Chief Justice Burger signed an order extending the time for the filing of the Petition for Writ of Certiorari herein, to and including February 25, 1975 (No. A-628).

The Jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED FOR REVIEW

Is the probable cause requirement of the Warrant Clause of the Fourth Amendment met in this case where a warrant authorizing the search of the entire residence (apartment) of the petitioners (husband and wife) for the marijuana and related narcotics paraphernalia, is based on a police officer's affidavit that recites on two recent occasions

police observed a marijuana plant on the balcony of their apartment and that upon inquiry the resident manager told the police that the tenant residing directly under the petitioners had complained many (unfixed) times about "loud noises and strange odors" (undescribed) coming from their apartment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment 4, United States Constitution

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

21 United States Code

§841. Prohibited acts A—Unlawful acts

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . ." Pub. L. 91-513, Title II §401, Oct. 27, 1970, 84 Stat. 1260.

33 District of Columbia Code

§33-402. Acts declared unlawful.

"(a) It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe,

administer, dispense, or compound any narcotic drug, except as authorized in this chapter." (June 20, 1938, 52 Stat. 787, ch. 532, §2; July 24, 1956, 70 Stat. 618, ch. 676, title III, §301(b).

STATEMENT OF THE CASE

On August 27, 1973, Officer Michael K. Smith of the Sixth District Vice Squad, Metropolitan Police Department (Washington, D.C.) swore to an affidavit before a Judge of the Superior Court of the District of Columbia for a daytime search warrant of the entire apartment known as Apartment 204 in premises 4200 East Capitol Street, S.E., Washington, D.C. This was the residence of the Petitioners, Mr. and Mrs. Robert J. Whitaker. The affidavit was brief. The essential averments in it were as follows.

1. On Thursday, August 23, 1973 at about 7:00 P.M., the affiant and Officer Stephen E. Granville, while on routine patrol, observed a green hanging-type plant in the left corner of the balcony at 4200 East Capitol Street, N.E., Apartment 204. Further observations with the use of binoculars revealed that the plant was in fact marijuana.

2. On Monday, August 17, 1973 at about 11:15 A.M., further observations by the police at the premises revealed that the plant was still in the corner of the balcony.

3. Further investigation on Monday, August 27, 1973, by Officer Smith revealed that the resident of Apartment 104 (a Mr. Senior Diggs), the apartment directly under Apartment 204, had complained on many occasions to the Resident Manager (Mr. Triggs) of the loud noises and strange odors coming from Apartment 204. Mr. Triggs was interviewed by the affiant and it was learned that the tenant of

Apartment 204 was the defendant, Robert Whitaker. Mr. Triggs furnished the Officer with Mr. Whitaker's phone number.

4. In the experience of the affiant, marijuana plants must have a large quantity of sunlight and are generally brought into the premises after darkness.

5. Due to the information received from Mr. Diggs via Mr. Triggs, it was the belief of the affiant that narcotic drugs are being used and probably being secreted in Apartment 204.

6. During the six months that the affiant had worked vice he had seized and observed marijuana plants growing on numerous occasions.

7. Affiant requested that a search warrant be issued for Apartment 204, "for violation of the Uniform Narcotics Act of the District of Columbia, *for the above-mentioned plants*". (Underscored portion of quoted language in hand printing.)

Based upon the affidavit, the Judge issued a day-time warrant to search: "The entire premises of Apartment #204, located in 4200 East Capitol Street, N.E., a brick apartment dwelling." The warrant stated that the Court was, "satisfied that there is probable cause to believe that the property so described [marijuana and related narcotic paraphernalia which is evidence of a crime] is being concealed on the designated premises." Officer Smith, the affiant, and other officers executed the search warrant at about 6:10 P.M. on the day it was issued.

As they approached the apartment to execute the warrant, Mrs. Whitaker was entering. She was told that the officers had a warrant to search the entire premises for

narcotics. Officer Smith told her that they (the officers) knew there were plants on the balcony, as they had observed them while walking up to the premises. They then went to the balcony and there found twelve live marijuana plants. They placed Mrs. Whitaker under arrest. They asked her if her husband was at home and if there were any other narcotics in the premises. To this she responded that her husband was not at home, that he was at work. Mrs. Whitaker called her husband and he arrived twenty minutes to a half hour later. Prior to his arrival, Officer Smith had seized a smoking pipe which was in the living room on a table. When Mr. Whitaker arrived, the officers advised him of his rights. They told him that they had already found some marijuana plants and asked him if there was any more stuff in the premises, weapons or anything of that nature. He told them he had a revolver. That was all he said. Mr. Whitaker showed the officers where the revolver was. It was in a chest of drawers in the bedroom. When they went into the bedroom Officer Smith saw a black plastic shopping bag lying beside the chest of drawer. The bag itself was in view, but it was shut or closed. In order for the officers to see the contents of the bag they had to pull the lid of the bag and open it. In the bag were strainers, spoons, white powder, and various cutting paraphernalia used to cut narcotics. These were seized. Aluminum foil was seized from the coffee table in the living room. From the vegetable bin in the kitchen refrigerator the officers seized a pill bottle containing some white powder, heroin and some cocaine. In the dining area the officers seized some seeds. Cash in the total amount of $1,392.00 was also seized from the persons of the two petitioners.

The Petitioners were charged in the United States District Court for the District of Columbia in a six-count

indictment for offenses arising out of this search of their apartment. The indictment charged both as follows: (1) possession with intent to distribute heroin (violation of 21 U.S.C. §841(a); (2) possession of heroin (violation of 33 D.C. Code §402); (3) possession with intent to distribute marijuana (violation of 21 U.S. Code §841 (a); (4) possession of marijuana (violation of 33 D.C. Code §402); (5) possession with intent to distribute cocaine (violation of 21 U.S. Code §841(a); and (6) possession of cocaine (violation of 33 D.C. Code §402).

At arraignment on October 19, 1973, both pleaded not guilty. Thereafter, a written pre-trial motion entitled "Motion to Quash Search Warrant and Suppress Evidence" was filed on their behalf. An evidentiary hearing was held on the said motion on November 7, 1973, and was denied. On November 12, 1973, trial was commenced before a jury and proceeded to November 13, 1973. The prosecution was permitted to introduce into evidence the marijuana, heroin, and cocaine seized from the Petitioners' apartment. At the conclusion of all the evidence, Count three of the indictment (charging both petitioners with possession with intent to distribute marijuana in violation of 33 D.C. Code §402) was dismissed by the trial judge. The case was then submitted to the jury on the remaining five counts. The jury deliberated and, with respect to petitioner Robert Whitaker returned a verdict of guilty as to Count One (possession with intent to distribute heroin in violation of 21 U.S. Code §841(a)), Count Four (possession of marijuana in violation of 33 D.C. Code § 402), and Count Five (possession with intent to distribute cocaine in violation of 21 U.S. Code §841(a); with respect to petitioner Jacquelyn Whitaker the jury returned a verdict of guilty as to Counts Two (possession of heroin in

violation of 33 D.C. Code §402) and Six (possession of cocaine in violation of 33 D.C. Code §402). On January 11, 1974, the case was called for sentence. Both defendants were placed on a term of probation. An appeal followed to the United States Court of Appeals for the District of Columbia Circuit. Upon consideration of the said appeal, the Circuit Court filed a judgment and memorandum opinion on December 27, 1974, affirming the judgment and conviction of the District Court.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The affidavit did not establish probable cause for a search as broad as that authorized by the warrant and that undertaken by the officers acting under it. The observations of the officers, set forth in the affidavit[1] established a basis (probable cause) to believe that a growing marijuana plant was on the balcony. These facts would have supported the issuance of a warrant, narrowly drawn, for the seizure of those plants. The affidavit, however, went farther and begged the conclusion, by way of an expression of the affiant's belief, "that narcotic drugs are being used and probably stored in the premises." This, standing alone, was not sufficient to constitute probable cause for a search of the entire apartment. By itself, it was purely conclusory. Under familiar standards, there must be set out "underlying circumstances" which provide

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[1] "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention." *Aquilar v. Texas*, 378 U.S. 108 (1963).

a basis or reason for such a belief. *United States v. Ventresca*, 380 U.S. 102 (1965).[2] The consideration then is whether there were adequate "underlying circumstances" recited in the affidavit to support the belief.

The basis recited in the affidavit to justify "the belief . . . narcotic drugs are being used and probably being secreted in the premises," was the complaints made by tenant Diggs about "loud noises" and "strange odors" coming from the petitioners' apartment. Noises and odors are varied and multiple. There was no description of either in the affidavit. What are the types and kinds of noises and odors associated with narcotics use and storage? How are they identified? How are they distinguished by a tenant, or even by the police, as being the kind that make one know, believe, or suspect narcotics activity? The requirements of probable cause would be more nearly satisfied if the person who experienced the odors and noises related that to his mind they bore such a relationship to narcotics use or activity. "If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant." *Johnson v. United States*, 333 U.S. 10 at page 13, (1948). If these "noises" and "odors", as such, are qualitatively adequate to establish probable cause (which is not so), then the absence of dates when they

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2 "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." 380 U.S. at page 109.

occurred, makes for a remoteness and uncertainty that destroys that probable cause. *Sgro v. United States*, 287 U.S. 206 (1932). A fair application of the principles of *Sgro, supra*, and the quoted language of the Supreme Court in *Johnson, supra*, to the "noises" and "odors" referred to in the subject affidavit, means that the statement is worthless in the probable cause context. This recital in the affidavit is deficient and inadequate in terms of the "underlying circumstances" test, declared essential in *Ventresca, supra*. No known or usual relationship exists between unspecified and undescribed "loud noises" and "strange odors" and narcotics in use and storage. Nor, is such a relationship established or inferred in the affidavit. The "belief" rather than being based upon facts and circumstances, rested on suspicion.[3] The affidavit, thus, failed to support the finding of probable cause that was set forth in the warrant. In turn, the warrant was unconstitutionally broad in terms of the demands of the Fourth Amendment. In response to the fancied showing of probable cause in the affidavit, the warrant authorized a general and complete search of the entire apartment for "marijuana and related paraphernalia." By its reference to "narcotics paraphernalia, the warrant left to the discretion

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[3] "A warrant to search a private dwelling may not rest upon mere affirmance of suspicion or belief without disclosure of supporting facts or circumstances. Under the Fourth Amendment, a judge may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmance. Mere affirmance of belief or suspicion is not enough. *Nathanson v. United States*, 290 U.S. 41, 47, 57 S.Ct. 11, 78 L.Ed. 159." *United States v. Dixon*, 334 F.2d 322, at p. 324 (6th Cir. 1964).

of the officers the type of search they were to conduct. The perimeters of the warrant were as broad as the extent of the search conducted under it. The search of the refrigerator, and the vegetable bin in it and the further search of a small "pill bottle" from the bin is illustrative of the scope of the search. The admission into evidence at the trial of the heroin and cocaine mixture (from the "pill bottle"), measurably led to the petitioners' convictions.

On the one hand, the affidavit was narrow and precise in its recitals about growing marijuana plants on the balcony. Based upon these recitals, adherence to Fourth Amendment safeguards, permitted only a circumscribed and limited intrusion by the police into the home of the petitioners to seize these plants.

Respectfully submitted,

BERNADETTE GARTRELL
508 Fifth Street, N.W.
Washington, D.C. 20001
638-4040
Attorney for Petitioners

CERTIFICATE OF SERVICE

This is to certify that I served 3 copies of the foregoing Petition for a Writ of Certiorari upon the respondent, United States of America by mailing three copies thereof, in a duly addressed envelope, postage prepaid, to Earl J. Silbert, United States Attorney, U.S. Courthouse, Washington, D.C., and by mailing three copies of the same, in the same manner, to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 25th day of February 1975.

BERNADETTE GARTRELL

APPENDIX

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

NO. 74-1306 — September Term, 1974
Criminal 845-73

United States of America

v.

Robert J. Whitaker, Appellant

No. 74-1307
United States of America

v.

Jacquelyn E. Whitaker, Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Fahy, Senior Circuit Judge, McGowan and Tamm, Circuit Judges

JUDGMENT

These causes came on for consideration on the record on appeal from the United States District Court for the District of Columbia and briefs were filed by the parties. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from in these causes

are affirmed, for the reasons set forth in the attached memorandum.

The duty of counsel is fully discharged without filing a suggestion for rehearing en banc unless the case meets the rigid standards of Federal Rule of Appellate Procedure 35(a).

Per Curiam
For the Court
/s/ Hugh E. Kline
Hugh E. Kline
Clerk

United States Court of Appeals
For the District of Columbia
Circuit
Filed December 27, 1974
HUGH E. KLINE
Clerk

No. 74-1306&7 - United States v. Whitaker

MEMORANDUM

These consolidated appeals are from convictions of a husband and wife on narcotics charges. Mr. Whitaker was convicted of possessing marijuana, and of possessing with intent to distribute heroin and cocaine; Mrs. Whitaker was convicted of mere possession of marijuana and cocaine. Both are presently on probation, having received suspended sentences. The convictions grew out of a search of their apartment and the seizure therein of narcotics substances and paraphernalia. The only issue is the admissibility of the fruits of that search.

Suspicion of appellants first arose out of the observations by police officers of a number of potted marijuana plants arranged on the balcony of their third-floor apartment. Binoculars were used in several of these, from distances as close as twenty yards, and by at least one officer who testified to having had considerable experience in identifying marijuana plants. A search warrant was obtained, the supporting affidavit recounting the observations described above, along with the fact that a resident of the building had complained on numerous occasions of "loud noises and strange odors" issuing from appellants' apartment. The affidavit therefore recited a belief that "narcotics drugs are being used and probably being secreted in the premises." The formal request was for a warrant to search "the entire premises . . . for violations of the Uniform Narcotics Act of the District of Columbia, for the aforementioned plants." A warrant was issued for a day-time search of "the entire premises" for "marihuana [sic] and related narcotic paraphernalia."

The warrant was executed in the late afternoon of the day on which it was obtained. Appellant Mrs. Whitaker was at home. After the officers had seized twelve marijuana plants on the balcony (their first act), she was arrested. A smoking pipe containing marijuana was also seized from a living room table. Before searching the rest of the apartment, however, the officers complied with Mrs. Whitaker's request that they wait until her husband returned from work. When he did, the search continued. A plastic shopping bag containing "cutting paraphernalia" was found in a bedroom. Small quantities of heroin and cocaine were found in a pill box in the vegetable bin of the refrigerator. Aluminum foil, marijuana seeds, and cash in the amount of $1,392.00 were also seized.

In their brief appellants primarily attack the validity of the search warrant. They charge that it was illegally broad, first, because on its face it authorized a "general search," and, second, because the supporting affidavit established the necessary probable cause only for a search that was more narrowly confined.

There is nothing unreasonable *per se* about a search of an entire apartment. Narcotics are seldom left in the open air or in a completely predictable hiding place; hence they would seldom be found if the police could not search an entire apartment on probable cause to believe that narcotics would be found somewhere therein.

Appellants' reliance on *United States v. Marti*, 421 F.2d 1263 (2d Cir. 1970), suggests a slightly different argument, still charging that this was on its face an illegal "general" warrant, but based on the indefiniteness of the description of the items to be seized, rather than on the physical scope of the authorized search. In the *Marti* case a warrant was held invalid because it authorized the seizure of any property the police might find that was being used or possessed in violation of New York's obscenity laws. Its flaw was that it "left to the executing officials the discretion of deciding what materials were obscene," this flaw being a fatal one in an area "touched by the First Amendment." *Id.* 1268.

There appears to be no parallel danger in authorizing the police to search for and seize "marijuana and narcotics paraphernalia." The First Amendment is not involved. There is little discretion left to the searching officer in allowing him to decide what is and is not narcotics or its paraphernalia. Indeed, greater specificity would scarcely have been possible. No case is cited in which a warrant

was challenged for its employment of the very common "narcotics and paraphernalia" description of the items to be seized; and a comparable generality of description has been approved in analogous contexts. *See, e.g., United States v. Scharfman,* 448 F.2d 1352, 1353 n. 1, 1354 (2d Cir. 1971) (warrant upheld where search authorized for "the [stolen] property specified and for such books and records as are being used as means and instrumentalities of the above described crimes"); *Katz v. United States,* 369 F.2d 130, 134 (9th Cir. 1966) *rev'd on other grounds,* 389 U.S. 347 (1967) (warrant upheld where search authorized for "wagering paraphernalia").

Lastly, there is the question of whether in this case probable cause existed for a search as broad as the one that took place. In their argument that it did not, appellants assume that such probable cause must be based on the hearsay evidence of the strange noises and smells given off by their apartment. They urge a lack of proper substantiation before the warrant issuer of these reports, and also the inadequacy of such information, even assuming its truth, to create probable cause to believe that narcotics would be found. The warrant does not appear, however, to require any support from the noise and smell reports. The police officers' careful and repeated observations of the rather large amount of marijuana growing on the balcony appear in themselves to establish probable cause to believe that narcotics were kept in the apartment that would only be uncovered by a thorough search. Appellants' position appears to be that the observations could justify a search only of the balcony, or only for living marijuana plants, which of course would not be found in a refrigerator vegetable bin or plastic shopping bag. But the presence of some narcotics strongly suggests the presence of more;

and even if the presence of cocaine and heroin were not indicated, there was at least probable cause to suspect that the apartment contained marijuana reduced to some easily secreted form.

Several other possible objections to appellants' convictions are hinted at in their brief and in the record. None has merit. There is some suggestion that because the words "for the aforementioned plants" were appended to the warrant application, the warrant should be regarded as authorizing only a search for living plants, with the result that the actual search through the plastic bag and refrigerator were beyond its scope. However, the application also requested a warrant to search "the entire premises for violations of the Uniform Narcotics Act." It may reasonably be read as requesting just that.

Without ever focusing their meaning in the form of legal arguments, appellants draw attention to certain aspects of the record which might be thought to undermine their convictions. They review evidence tending to show that the view which the police officers claimed to have had of the appellants' balcony was actually obstructed by trees, and also that the officer who obtained the search warrant was not as expert as he claimed to be in the visual identification of marijuana plants. But these are questions of fact that were resolved against appellants in the suppression hearings, and in a way that cannot be characterized as clearly erroneous.

Finally, appellants' brief reviews such evidence as there was tending to show that Mr. Whitaker was a narcotics user only, rather than a dealer, and that Mrs. Whitaker knew nothing about her husband's activities or about the identity of the plants on her balcony. These again are factual questions that have been resolved below, by a jury in this instance, and not without ample evidentiary support.